plaintiff should be reduced and be subservient to the equity of the intervenor.

In view of what has been stated above, judgment must be given to the plaintiff and the order of this court dated 26 April 1988 is sustained. On the other hand, the application of the intervenor to stay the auction and to set aside the said order is dismissed with costs.

Plaintiff's application allowed.

Solicitors: *PG Lim & Co; Adnan Sundra & Low.*

Reported by *PS Ranjan*

Public Bank Bhd v Metro Construction Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 31-699-86
LIM BENG CHOON J
13 FEBRUARY 1990

Agency — Directors of company — Transactions undertaken by directors — Fraud committed by directors against members of company — Whether directors had authority to undertake transactions — Actual authority — Ostensible authority

Companies and Corporations — Memorandum of association — Objects clauses — Construction — Principles applicable

Companies and Corporations — Ultra vires — Companies — Memorandum of association — Directors — Authority — Charges created over property of company — Fraud committed by directors against members — Whether directors had authority to undertake transactions — Whether transactions intra vires memorandum of association of company — Companies Act 1965, s 20(1)

The defendant company had created two charges over some land belonging to it in favour of the plaintiff bank to secure the repayment of two loans given by the plaintiff bank to a company called Tenaga Muhibbah Sdn Bhd ('Tenaga'). The charges were duly registered and following default in repayment of the loan by Tenaga, the plaintiff bank proceeded under the National Land Code 1965 to apply to the court for an order for sale by public auction of the land. One Lee Khai Hong, who claimed to be a director and the major shareholder of the defendant, affirmed and filed an affidavit in the proceedings. In the affidavit, he claimed that two men, one Yeoh Kok Ooi and one Yeoh Seng Lye, under the pretext of acquiring the entire share capital of the defendant company, had tricked him and the other directors of the defendant company into resigning from office and to appoint the two Yeohs as directors in their place. He also said that the two Yeohs had persuaded them to surrender to the two Yeohs the document of title to the land which they did. He also said that without the knowledge of the secretary to the defendant company and its shareholders, the two Yeohs, as directors of the defendant company, then passed a resolution authorizing the defendant company to create the charges as security for credit facilities granted by the plaintiff bank to Tenaga. Lee said that the defendant company had no dealing whatsoever with Tenaga. The two Yeohs had apparently failed to pay for the shares which continued to remain with the vendors.

An order was made for the sale of the land by public auction. Subsequently, the defendant company obtained, on an ex parte application, an order for stay of execution of the order for sale. The plaintiff bank applied for an order to set aside the order for stay.

It was contended for the defendant company that the execution of the charges was ultra vires the defendant company's memorandum of association and that, even if it was intra vires the memorandum, it was ultra vires the powers of the directors as provided in the defendant company's articles of association. It was also contended that as the charges were created not for the benefit of the defendant company but for the benefit of a third party, the creation of the charges was therefore outside the borrowing power of the defendant company as provided in the articles. It was also contended that as the charges were created 'not on account or instruction of the company', the creation of the charges was in breach of the articles. There was no allegation that the plaintiff bank had knowledge at the material time of the fraud committed by the two Yeohs against the shareholders of the defendant company.

Held, dissolving the order granting stay :

(1) A company's objects as stated in its memorandum of association cannot be departed from. An attempted departure is as invalid as if the memorandum were a statute of incorporation; it is ultra vires the company and cannot be validated by assent of a general meeting of the members or by taking judgment against the company by consent or by estoppel.

(2) In the construction of the objects clauses of a memorandum of association, the ordinary rules applicable to the construing of documents apply equally well to the construction of objects clauses. There is no special rule of interpretation by reference to what are supposed to be the main or principal objects of a company where the question is whether something done or proposed to be done is ultra vires.

(3) If a transaction is covered by the objects clauses, a party to the transaction is not bound to inquire as to the company's capacity to enter into it or as to any such limitation on the directors' powers, and the parties will be presumed to have acted in good faith unless the contrary is proved.

(4) In the present case, it could not be gainsaid that the creation of the charges was within the objects clauses of the defendant company.

(5) The fraud committed by the two directors against the shareholders and the excess of authority on the part of the said directors was a matter only between the said directors and the shareholders. More importantly, there was nothing improper or illegal in the transactions. The plaintiff bank had accepted the two charges in good faith and in pursuance of transactions which prima facie were lawful and properly carried out.

(6) The two directors had 'actual' authority to execute the two charges. Even assuming that the 'actual' authority was found wanting it surely could not be said that they did not have, at the material time, an 'apparent' or 'ostensible' authority to execute the charges. Further, where a company had a general power to borrow money for the purposes of its business, a lender was not bound to enquire into the purposes for which the money was intended to be applied.

(7) Even assuming that the charges were ultra vires the defendant's memorandum and articles of association, they could be saved by s 20(1) of the Companies Act 1965.

[Bahasa Malaysia summary

Syarikat defendan mewujudkan dua gadaian atas beberapa tanah kepunyaanya bagi faedah bank plaintif bagi menjamin pembayaran balik dua pinjaman yang diberi oleh bank plaintif kepada sebuah syarikat yang dipanggil Tenaga Muhibbah Sdn Bhd ('Tenaga'). Gadaian-gadaian tersebut telah didaftar dengan sempurna dan berikutan keingkaran dalam pembayaran balik pinjaman itu oleh Tenaga, bank plaintif meneruskan di bawah Kanun Tanah Negara 1965 bagi memohon kepada mahkamah untuk satu perintah jualan melalui lelong awam tanah tersebut. Seorang, Lee Khai Hong, yang mendakwa menjadi seorang pengarah dan pemegang saham terbesar defendan, bersumpah dan menfail satu afidavit dalam prosiding. Dalam afidavitnya, dia mendakwa bahawa dua orang lelaki, satu Yeoh Kok Ooi dan satu Yeoh Seng Lye, di bawah helah membeli kesemua modal syer syarikat defendan telah emnipunya dan lain-lain pengarah syarikat defendan dalam meletak jawatan daripada pejabat dan melantik dua Yeoh sebagai pengarah mengganti tempatnya. Dia juga berkata bahawa dua Yeoh telah mempengaruhi mereka supaya menyerah kepada dua Yeoh dokumen hakmilik kepada tanah, di mana mereka berbuat demikian. Dia juga berkata bahawa tanpa pengetahuan setiusaha kepada syarikat defendan, dan pemegang syernya, dua Yeoh, sebagai pengarah syarikat defendan, kemudiannya meluluskan satu resolusi memberikuasa syarikat defendan mewujudkan gaidaian-gadaian sebagai cagaran untuk kemudahan kerdit yang diberi oleh bank plaintif kepada Tenaga. Lee berkata bahawa syarikat defendan tidak ada urusniaga langsung dengan Tenaga. Dua Yeoh telah nampaknya gagal membayar untuk syer-syer yang masih tertinggal dengan penjual-penjual.

Satu perintah dibuat untuk penjualan tanah melalui lelong awam. kemudiannya, syarikat defendan memperolehi, atas satu permohonan ex parte, satu perintah bagi penggantungan pelaksanaan perintah jualan itu. Bank plaintif memohon untuk satu perintah mengenepikan perintah untuk penggantungan itu.

Adalah dihujahkan bagi syarikat defenda bahawa penyempurnaan gadaian adalah ultra vires memorandum syarikat dan bahawa, malahan, sekiranya ianya intra vires memorandum itu, ia adalah ultra vires kuasa-kuasa pengarah-pengarah seperti yang diperuntukan dalam perkara-perkara persatuan syarikat itu. Adalah dihujah bahawa oleh kerana gadaian-gadaian telah diwujudkan bukan bagi faedah syarikat defendan tetapi bagi faedah pihak ketiga, penwujudan gadaian-gadaian adalah diwujudkan 'bukan atas keterangan atau arahan syarikat itu', penwujudan gadaian-gadaian adalah melanggar perkara-perkara. Tidak ada hujah bahawa bank plaintif mempunyai pengetahuan pada masa material fraud itu dilakukan oleh dua Yeoh terhadap pemegang saham syarikat defendan.

Diputuskan, membubarkan perintah penggantungan:

(1) Objek-objek sebuah syarikat yang dinyatakan dalam memorandum persatuan tidak boleh disimpang daripadanya. Satu percubaan untuk menyimpang daripadanya adalah tak sah seakan-akan memorandum itu adalah satu statut pemerbadanan; ia adalah ultra vires syarikat dan tidak oleh disahkan melalui persetujuan oleh satu mesyuarat agung ahli-ahlinya atau dengan mengambil penghakiman terhadap syarikat secara persetujuan atau secara estopel.

(2) Dalam pentafsiran fasal-fasal satu memorandum persatuan, kaedah-kaedah biasa yang terpakai pekada pentafsiran dokumen terpakai dengan sama kepada pentafsiran fasal-fasal objek. Tidak ada kaedah terjemahan yang istemewa dengan rujukan kepada apa yang dijangkakan menjadi objek utama atau prinsipal sebuah syarikat di mana soalannya ialah sama ada sesuatu yang telah dibuat atau dicadang hendak dibuat adalah ultra vires.

(3) Sekiranya satu transaksi diliputi oleh fasal objek-objek, satu pihak kepada transaksi tidak terikat untuk menanya mengenai keupayaan syarikat memasuki ke dalamnya atau mengenai sebarang had atas kuasa-kuasa pengarah, dan pihak-pihak akan dianggap sudah bertindak dalam suci hati melainkan sebaliknya dibuktikan.

(4) Dalam kes sekarang, tidaklah boleh disangkal bahawa penwujudan gadaian-gadaian adalah di dalam fasal-fasal objek syarikat defendan.

(5) Fraud yang dilakukan oleh kedua-dua pengarah terhadap pemegang saham dan kelampauan kuasa di pihak pengarah-pengarah tersebut adalah satu perkara hanya di antara pengarah-pengarah tersebut dan pemegang sahamnya. Adalah lebih penting, tidak ada apa-apa yang tidak wajar atau menyalahi undang-undang dalam transaksi-transaksi itu. Bank plaintif telahpun menerima kedua-dua gadaian dalam suci hati dan menurut transaksi-transaksi yang sah secara prima facie dan telah dilaksanakan secara wajar.

(6) Kedua-dua pengarah itu mempunyai kuasa yang sebenar untuk menyempurnakan kedua-dua gadaian itu. Walaupun dianggap bahawa 'kuasa sebenar' itu didapati kekurangan, ia tentunya tidak boleh dikata bahawa mereka tidak ada, pada masa material itu, satu kuasa yang nyata atau zahir bagi menyempurnakan gadaian-gadaian itu. Lagipun, di mana sebuah syarikat mempunyai satu kuasa am untuk meminjam wang bagi tujuan perniagaannya, sesuatu peminjam tidak terikat untuk menyiasat ke dalam tujuan-tujuan bagi mana wang itu diniatkan untuk digunakan.

(7) Walaupun dianggap bahawa gadaian-gadaian itu adalah ultra vires, mereka boleh diselamatkan oleh s 20(1) Akta Syarikat 1965.]

Cases referred to

1 *Cotman* v *Brougham* [1918] AC 514 (folld)
2 *Great North-West Central Railway Co & Ors* v *Charlebois & Ors* [1899] AC 114 (folld)
3 *Anglo Overseas Agencies Ltd* v *Green & Anor* [1960] 3 All ER 244 (folld)
4 *Re Introduction's Ltd* [1969] 1 All ER 887 (folld)
5 *Re David Payne & Co Ltd* [1904] 2 Ch 608 (folld)
6 *The Royal British Bank* v *Turquand* 119 ER 474 (folld)
7 *Freeman and Lockyer* v *Buckhurst Park Properties (Mangal) Ltd & Anor* [1964] 1 All ER 630 (refd)
8 *Rolled Steel Products (Holdings) Ltd* v *British Steel Corporation & Ors* [1986] 1 Ch 246 (folld)

Legislation referred to

Companies Act 1965 s 20(1)
National Land Code 1965 ss 242, 254

CK Yeoh for the plaintiff.
VL Yiew for the defendants.

Cur Adv Vult

Lim Beng Choon J: Metro Construction Sdn Bhd ('Metro'), the defendants in this originating summons, are the registered owners of the land held under Grant 1st Grade Lot 297 Section 1, Tanjung Tokong, Penang ('the land'). They executed two third party charges on the land in favour of Public Bank Bhd ('the bank') to

secure the repayments of the two loans amounting to $1.2m given by the bank to the third party, Tenaga Muhibbah Sdn Bhd ('Tenaga'). The two charges were duly registered under s 242 of the National Land Code 1965 ('NLC') on the same date, that is, on 13 December 1984. The instruments effecting the charges, namely, Form 16A with the annexures, were signed by two persons who claimed to be the directors of Metro and the said instruments were duly affixed with the company's seal. Apparently, Tenaga failed to repay the loans and the accrued interests and on 24 December 1985, the bank accordingly issued a notice in Form 16D pursuant to s 254 of the NLC to Metro demanding payment of the outstanding sum within the period as specified in the notice, failing which the bank would apply to the court for an order for the sale of the land. Metro had failed to settle the outstanding sum within the specified period and the bank accordingly instituted this action on 20 March 1986 for an order for the sale of the land by public auction to satisfy the outstanding sum owed to them by Tenaga. An affidavit was simultaneously filed by the bank stating the grounds in support of the application for an order for sale of the land (encl 2).

After the service of this originating summons on Metro was effected, one Lee Khai Hong, who claimed to be one of the directors and the major shareholder of Metro, filed an affidavit affirmed on 16 September 1987 (encl 8) to oppose the proceeding to sell the land. In his affidavit he alleged that some time in January 1984, one Yeoh Kok Ooi and one Yeoh Seng Lye (for convenience, I shall refer to them as 'the two Yeohs' unless otherwise specifically stated), on the pretext of acquiring Metro by the purchase of all the shares of Metro, tricked him and the other five directors to resign and to appoint the two Yeohs to be directors in place of them. He produced a copy of the company's resolutions dated 4 January 1984 which was annexed to his affidavit as exh 'A2'. The resolutions proposed and accepted by all the directors can be summarized thus:

(a) the resignation of all the six directors was to be of immediate effect;
(b) the approval of the transfer of the 400,000 ordinary shares from the six current shareholders to the two Yeohs at the purchase price specified in the resolution was accepted;
(c) step would be taken to effect the transfer by the cancellation of the old share certificates and the issue of new certificates;
(d) the two Yeohs were duly appointed as directors of the company with immediate effect;
(e) Yeoh Seng Lye was made the chairman of the company with immediate effect; and
(f) Yeoh Kok Ooi was appointed as managing director of the company with immediate effect.

It was also alleged that after the resolutions were passed and adopted, the two Yeohs persuaded the former directors to surrender the original title deed of the land to the two Yeohs which they did. Thereupon on 21 November 1984 the two Yeohs without the knowledge, authority or approval of the company secretary or any of the shareholders unilaterally passed a resolution authorizing the company to create two third party charges on the land. A copy of the said resolution dated 21 November 1984 was annexed to the affidavit as exh 'A5'. The resolution was conveyed in a note bearing the company's name and address and it said:

> Pursuant to the authority given by art 124 of the company's articles of association, we, the undersigned, being all the directors of the abovenamed company hereby resolved:
>
> 'That the company do and is hereby authorized to create a third party first and second legal charge on the property of the company known as Lot 297, Section 1, Bandar Tanjong Tokong, Daerah Timur Laut, Pulau Pinang for banking facilities granted to M/s Tenaga Muhibbah Sdn Bhd by M/s Public Bank Berhad in the total amount of $1,200,000 (one million and two hundred thousand only) and that Mr Yeoh Kok Ooi @ Yeoh Kok Wooi be and is hereby authorized to execute the charge and other documents pertaining to the above facilities, and the company be and is hereby also authorized to execute a corporate guarantee for the same banking facilities and the common seal of the company be affixed to the relevant documents in the above connection.

It was dated 21 November 1984 and was signed by Yeoh Seng Lye and Yeoh Kok Ooi. The deponent went on to say that it was only some time in 1985 that the former directors of Metro were made aware of the two third party charges created by the two Yeohs with the bank. He asserted that Metro had no dealing whatsoever with Tenaga, neither did Metro receive any moneys from the bank in respect of the charges. It also appeared that the two Yeohs had failed to pay for the shares of the company. The shares still remain with the six shareholders of which Lee Khai Hong holds the majority share.

At the hearing of this originating summons, an order in terms of the summons was made by Dato' Ajaib Singh J (as he then was) on 12 February 1988 and the date of the auction of the land was fixed on 19 August 1988. Summon-for-directions was duly taken out on 14 April 1988 and on 22 June 1988, the senior assistant registrar ('SAR') of this court made an order regarding the procedure of the sale. The reserved price of the land was fixed at $910,000.

On 15 September 1988, Metro filed in an ex parte summons-in-chambers (encl 13) to request the court for an order that the plaintiff be stayed from the execution of the order of the court dated 12 February 1988 directing the sale of the land by public auction. They also requested that Metro be granted leave to set aside

the said order. Apparently the auction of the land had not yet been carried out although it is not clear as to why it was not done. In support of the application, an affidavit (encl 12) was filed by one Goh Nai Kooi on 15 September 1988 in his capacity (so he claimed) as a director of Metro. He repeated the allegations as set out in the earlier affidavit of Lee Khai Hong and further stated that the two third party charges were null and void as the resolution authorizing the two charges was not made in compliance with the company's memorandum and articles of association. It went on to say that, under the articles of association of the company, the directors of the company were empowered only to borrow or raise money or secure repayment or payment of such sums by mortgage or charge upon any of the properties of Metro for the purposes of the company. To enable a charge over Metro's property created for the purpose or benefit of a third party, the consent and resolution of the general meeting was required. In creating the said charges, the two Yeohs had failed to comply with these pre-requisites. It was also alleged that the solicitors acting for the bank had been informed by letter dated 24 June 1987 written by Metro's solicitors that police investigation had commenced against the two Yeohs.

The ex parte application of Metro came on for hearing on 16 September 1988 and Datuk Razak J allowed the application and made an order in terms of the application.

The bank thereafter applied to set aside the order granting the stay. Their application by way of summons-in-chambers was filed on 18 October 1988. In support of the application, the manager of the bank, Toh Wah San ('Toh') filed an affidavit (encl 19). The contents of this affidavit may be briefly summarized as follows:

(a) the bank had no knowledge whatsoever of the purported frauds committed by the two Yeohs when the third party charges were executed;
(b) the resolution dated 21 November 1984 authorizing the creation of the two charges was made available to the bank by Metro when the said charges were executed. The said charges were therefore valid and enforceable by the bank upon default by Tenaga;
(c) the bank was not obliged to enquire into the power of Metro to grant third party charges. A copy of Form 49 conveying the appointment of the two Yeohs as directors to the registrar of companies was produced and annexed to the affidavit.

It was further asserted by Toh that upon receipt of this originating summons by Metro's former solicitors, Metro attempted to negotiate with the bank's solicitors for a settlement of the outstanding sum. As late as 9 February 1987 all the shareholders of Metro, through their former solicitors, had indicated that they were making arrangements to salvage the company and redeem the land and that they would be coming up with some concrete proposals for settlement. The notice of appointment to hear this originating summons was served on Metro on 26 June 1987. But none of the representatives or shareholders of Metro nor their solicitors thought it fit to appear at the hearing of the originating summons when the order for sale of the land was made on 12 February 1988. Likewise Metro's representatives, shareholders and solicitors had also failed to appear at the hearing of the summons-for-directions made by the SAR though Metro was duly served with the summons. The bank also produced a letter dated 27 September 1986 annexed as exh 'PBB5' to Toh's affidavit. The letter was written by the solicitors acting for the shareholders of Metro and addressed to the two Yeohs. It indicated, inter alia, that unless the two Yeohs took steps to redeem the land and make good the losses sustained by the shareholders, appropriate civil and criminal proceedings would be initiated by the shareholders. It also said that the shareholders were not prepared to accept Yeoh Seng Lye's offer to resign as director of Metro made on 8 August 1985. By reason of the conduct of six shareholders of Metro it was therefore alleged that they had not acted bona fide in their application to set aside the order for sale.

Counsel for Metro in his written submissions tendered at the hearing of the bank's application to set aside the order and to stay the execution of the sale of the land has posed two questions to this court:

(i) Whether the third party charges were ultra vires the company's memorandum of association (substantive ultra vires) and if so whether the transactions were saved by s 20(1) of the Companies Act 1965.
(ii) Whether the third party charges even if intra vires the company's memorandum, if created by the directors acting outside and beyond their powers as provided in the company's articles of association (procedural ultra vires) binds the company and whether s 20 of the Companies Act 1965 applies to such circumstances.

To answer these two questions, it is necessary to set out the relevant clauses and articles of the memorandum and articles of association of Metro which have been produced and annexed as exh 'GNK2' to the affidavit of Goh Wai Kooi in encl 12 of the court's file. In extracting the relevant clauses from the memorandum of association, I must bear in mind that although a company memorandum must state the objects of the company, it is not uncommon that a memorandum does usually set out as objects of the company many of the powers which the company would be entitled to exer-

cise in carrying out its objects. Such a practice, though criticized in *Cotman* v *Brougham*[1] (at pp 522-523) does not render the memorandum inconclusive. A cursory glance at the memorandum of Metro will show that the company was established to carry on a very wide range of business enterprises such as housing development, importing, exporting, manufacturing and sales of many kinds of goods, running of hotels and restaurants, operating travel agencies, mining and quarries. One significant object is set out in sub-cl (31) of cl 3 which reads:

> To carry on business as financiers, factors, moneylenders, hire-purchase financiers, concessionaires, manufacturers representatives, forwarding and collecting agents, insurance agents, real property and estate brokers and agents, commission, managing and general agents, indenting agents, franchise holders and dealers in options of all kinds and to promote, undertake, execute, operate, transact, supervise or otherwise carry on all kinds of financial, trading, manufacturing, processing, milling, curing, packing and maintenance servicing business or other kinds of business which may be capable of being carried on in connection therewith.

The powers to carry this object are expressed in the following subclauses of the said cl 3 of the memorandum:

> (40) To invest, lend, advance or otherwise deal with the company's moneys not immediately required in such a manner as shall from time to time be determined and to draw, accept, endorse, discount, issue or otherwise execute debentures, mortgages, bills of lading or exchange, promissory notes, guarantees and other negotiable or transferable instruments.
>
> (41) To lend and advance money on any term as may be determined to customers, agents, dealers or employees of the company or other corporations or persons who have dealings with the company and to guarantee the payment of any loan made to any of them.
>
> (44) To borrow, raise or otherwise secure the payment of money or loans by mortgage, guarantee, issue of debentures or in other manner which may be beneficial to the company and for the purposes or for any lawful purpose to charge all or any of the properties, assets or uncalled capital, present and future, and collaterally or further to secure any securities of the company by a trust deed or other assurance.
>
> (50) To guarantee or become liable to or give securities for any payment of money, repayment of loans or any credit facility, performance of contracts or duties or any issue of letters of guarantee, hypothecation or credit by any bank, company, person or others on account or instruction of the company.

The relevant articles of the articles of association of Metro which are useful to set out in full are:

> 4 Any branch or kind of business which by the memorandum of association of the company or by these articles is either expressly or by implication authorised to be undertaken by the company, may be undertaken by the directors at such time or times as they shall think it fit and further may be suffered by them to be in abeyance, whether such a branch or kind of business may have been actually commenced or not, so long as the directors may deem it expedient not to commence or proceed with such a branch or kind of business.
>
> 86 Unless otherwise determined by a general meeting, the number of directors shall not be less than two nor more than seven.
>
> 98 The directors may entrust to and confer upon the managing director, joint managing directors and assistant managing directors any of the powers exercisable by them as directors on such terms and conditions and with such restrictions as they think fit and either collaterally with or to the exclusion of their own powers and may from time to time revoke, withdraw, alter or vary all or any of the powers entrusted or conferred.
>
> 102 The business of the company shall be managed by the directors, who may pay all expenses of and preliminary and incidental to promotion, formation, establishment and registration of the company as they think fit, and may exercise all such powers of the company and do on behalf of the company all such acts as may be exercised and done by the company except such powers or acts which by the Act or by these articles are required to be exercised or done by the company in general meeting, subject nevertheless to the provisions of these articles, to the provisions of the Act and to such regulations being not inconsistent with the aforesaid regulations or provisions as may be prescribed by the company in general meeting, but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulations had not been made.
>
> 103 The directors shall have power to borrow or raise money from time to time *for the purpose of the company or secure the payment of such a sum as they think fit and may secure the repayment or payment of such sums by mortgage or charge upon all or any of the properties or assets of the company* or by the issue of debentures (whether at par or at discount or premium) or otherwise as they may think fit. (Emphasis is mine.)
>
> 119 The quorum necessary for the transactions of the business may be fixed by the directors and unless so fixed at any other number, shall be two. A meeting of the directors at which a quorum is present shall be competent to exercise all the powers and discretions for the time exercisable by the directors.
>
> 124 A resolution in writing signed by all the directors shall be as valid and effectual for all purposes as a resolution passed at a meeting of the directors duly convened, held and constituted.
>
> 126 The seal shall not be affixed to any instrument except by the authority of a resolution of the board of directors and in the presence of any two directors or of at least one director and of the secretary or such other person as the directors may appoint aforesaid shall sign every instrument to which the seal is so affixed in their presence and in favour of any person bona fide

> dealing with the company. Such signatures shall be conclusive evidence of the fact that the seal has been properly affixed.

In my consideration of the first limb of question (i) posed by counsel for Metro, namely, whether the third party charges are ultra vires the company's memorandum of association, it must be noted that a company's objects as stated in its memorandum cannot be departed from. An attempted departure is as invalid as if the memorandum were a statute of incorporation; it is ultra vires the company and cannot be validated by assent of a general meeting of the members or by taking judgment against the company by consent or by estoppel. This proposition is neatly stated in the following short passage of the judgment of the Privy Council in *Great North-West Central Railway Co & Ors* v *Charlebois & Ors*[2] at p 124:

> It is quite clear that a company cannot do what is beyond its legal powers by simply going into court and consenting to a decree which orders that the thing shall be done.

Next it must be borne in mind that in the construction of the object clauses of a memorandum, the ordinary rules applicable to the construing of documents apply equally well to the construction of the object clauses. There is no special rule of interpretation by reference to what are supposed to be the main or principal objects of a company where the question is whether something done or proposed to be done is ultra vires. Thus in *Cotman* v *Brougham*,[1] Lord Parker said at pp 520-521:

> The question whether or not a transaction is ultra vires is a question of law between the company and a third party. The truth is that the statement of a company's objects in its memorandum is intended to serve a double purpose. In the first place it gives protection to subscribers, who learn from it the purposes to which their money can be applied. In the second place it gives protection to persons who deal with the company, and who can infer from it the extent of the company's powers. The narrower the objects expressed in the memorandum the less is the subscribers' risk, but the wider such objects the greater is the security of those who transact business with the company. Moreover, experience soon showed that persons who transact business with companies do not like having to depend on inference when the validity of a proposed transaction is in question. Even a power to borrow money could not always be safely inferred, much less such a power as that of underwriting shares in another company. Thus arose the practice of specifying powers as objects, a practice rendered possible by the fact that there is no statutory limit on the number of objects which may be read as ancillary to and exercisable only for the purpose of attaining what might be held to be the company's main or paramount object, and on this construction no one could be quite certain whether the court would not hold any proposed transaction to be ultra vires. At any rate, all the surrounding circumstances would require investigation. Fresh clauses were framed to meet this difficulty, and the result is the modern memorandum of association with its multifarious list of objects and powers specified as objects and its clauses designed to prevent any specified object being read as ancillary to some other object.

The proposition is reiterated by Salmond J in *Anglo Overseas Agencies Ltd* v *Green & Anor*.[3] The third general principle which is worthy of notice is that if a transaction is covered by the object clauses, a party to the transaction is not bound to inquire as to the company's capacity to enter into it or as to any such limitation on the directors' powers and the party will be presumed to have acted in good faith unless the contrary is proved. In *Brougham*'s case,[1] Lord Parker reiterated this principle at p 521 of the reported case:

> A person who deals with a company is entitled to assume that a company can do everything which it is expressly authorized to do by its memorandum of association, and need not investigate the equities between the company and its shareholders.

This passage in the judgment of Lord Parker was followed by Harman LJ in *Re Introduction's Ltd*[4] at p 890 who went on to cite the following words appearing in the headnote of the case of *Re David Payne & Co Ltd*:[5]

> Where a company has a general power to borrow money for the purposes of its business, a lender is not bound to enquire into the purpose for which the money is intended to be applied, and the misapplication of the money by the company does not avoid the loan in the absence of the knowledge on the part of the lender that the money was intended to be misapplied.

Reverting to the object clauses of the memorandum of association of Metro, I have no doubt that the object under cl 3 sub-cl (31) is wide enough to indicate that one of the objects of Metro is to carry on the business akin to that of a financial institution which, needless to say, includes that of raising money from loan by way of a charge on real properties. The phrases 'To carry on business as financiers', '...to promote, undertake, execute, operate transact, supervise or otherwise carry on all kinds of financial trading...' and 'or other kinds of business which may be capable of being carried on in connection therewith' clearly support this proposition. In carrying out this kind of business, Metro is empowered under sub-cl (44) of cl 3 to borrow money as provided in that subclause. Likewise Metro is also empowered under sub-cl (50) of the said cl 3 to guarantee or give securities for any payment of money, repayment of loan or any credit facilities including credit facilities given by banks in the manner as provided therein. In the circumstances, it cannot be gainsaid that the creation of the two third party charges are within the object clauses of Metro. It cannot likewise be disputed that Metro has the necessary powers to create these two third party charges. But it was then contended, firstly, that as the two charges were created not for the benefit of the company but for the benefit of a third party, the creation of the two charges was therefore outside the

borrowing power conferred under sub-cl (44). Secondly, it was said that as the said charges were created 'not on account or instruction of the company', the creation likewise was in breach of sub-cl (50). As the first contention is inter-related to the question (ii) posed by counsel for Metro, I will deal with this contention in my answer to the said question (ii) later in this judgment. In considering the second contention, it is to be noted that there is no plea that the bank had, at the material time, knowledge of the fraud committed by the two Yeohs against the shareholders of Metro. Neither is there any statement setting out facts from which such knowledge can be inferred. The only allegations made against the bank were that a police report had been lodged on 4 April 1987 against the two Yeohs and that the bank's solicitors were informed on 24 June 1987 of the said report and the commencement of the investigation by the police on that report. Bearing in mind that the two charges were executed on 13 December 1984 and this action for an order for the sale of the land was instituted on 20 March 1986, how can one impute knowledge of the fraud committed by the two Yeohs to the bank? So the allegations of Metro amount to no more than that, as between the two directors Yeoh Seng Lye and Yeoh Kok Ooi and the shareholders, the said two directors had, in executing the two charges, acted fraudulently and in excess of their authority. But the fraud committed by the two directors against the shareholders and the excess of authority on the part of the said directors is a matter only between the said directors and the shareholders. More importantly, when I look at the transactions leading to the creation of the two charges, I cannot find anything improper or illegal in the transactions. From the return of the particulars of directors sent to the registrar of companies in Form 49, it was clearly stated that the two Yeohs were appointed directors of the company with effect from 4 January 1984 and that they were the only two directors; there were no other persons appointed as director. The resolutions of the company dated 21 November 1984 authorizing the creation of the two charges were said to have been made pursuant to art 124 of the articles of association of the Metro. The signatures of these two directors are affixed thereto. The instruments effecting the two charges were also signed by these two directors and the seal of the company was affixed to every one of the instruments. In the circumstances, it cannot be disputed that the bank executed the two charges in good faith and in pursuance of transactions which prima facie are lawful and properly carried out. For these reasons and on the principles discussed above I have no hesitation in rejecting the contention of counsel. If a further authority is required I would refer to the case of *The Royal British Bank* v *Turquand*[6] where it is said at p 479:

> Looking to the business to be carried on by this company, it might well be presumed that opening such an account and carrying on such dealings with a banking house as are described in the condition would be within the authority of the directors, and would be for the benefit of the shareholders. A mere excess of authority by the directors, we think, of itself would not amount to a defence. The bond being under the seal of the company, the gist of the defence must be illegality. If the directors had exceeded their authority to the prejudice of the shareholders by executing the bond, and this had been known to the obligees, illegality, we think, would have been shewn. The obligors in executing, and the obligees in accepting, the bond might be considered as combining together to injure the shareholders; the two parties would have been in pari delicto: and the action could not have been maintained. In such circumstances potior est conditio defendentis. But without the scienter, and without prejudice to the shareholders or any others whatsoever, illegality is not established against the obligees. If no illegality is shewn as against the party with whom the directors contract under the seal of the company, excess of authority is a matter only between the directors and the shareholders.

I now turn to the first limb of question (ii) posed by counsel, namely, whether the third party charges if created by the directors acting outside and beyond their powers would bind the company. In his written submission counsel for Metro relied first on art 102 of the articles of association of the company which empowered the directors of the company to manage the business of the company and to exercise all the powers and to act on behalf of the company subject nevertheless to the provisions of the articles of association. The second article relied on is art 103 which says inter alia that 'the directors shall have power to borrow or raise money from time to time for the purpose of the company.' Counsel contended that, reading the two articles together, the directors of Metro could only borrow money for the purposes of the company and not, as it happened here, for a third party. Furthermore as the loans raised by the two charges were for the benefit of a third party and not the company, sub-cl (44) of cl 3 of the memorandum of association had also been violated. In support of his contention, counsel drew my attention to a passage from the judgment of Diplock LJ in *Freeman and Lockyer* v *Buckhurst Park Properties (Mangal) Ltd & Anor*[7] at p 646, where the learned judge after having analysed the relevant law, summarized the result of his analysis by stating four conditions which must be fulfilled to entitle a contractor to enforce against a company a contract entered into on behalf of the company by an agent who had no actual authority to do so. In fairness to the learned counsel, he did not intend that I should read that passage in isolation and ignore what Lord Diplock had really said in his analysis of the law. I will therefore cite the following passage of the judgment at p 644 where the learned judge drew a distinction between an 'actual' authority of an agent and an 'apparent' or 'ostensible' authority:

> An 'actual' authority is a legal relationship between principal and agent created by a consensual agreement to which

they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties. To this agreement the contractor is a stranger; he may be totally ignorant of the existence of any authority on the part of the agent. Nevertheless, if the agent does enter into a contract pursuant to the 'actual' authority, it does create contractual rights and liabilities between the principal and the contractor.

...

An 'apparent' or 'ostensible' authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted on by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed on him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation. The representation, when acted on by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

Now there is no dispute or at least it cannot be disputed that, at the material time, Metro had only two directors, namely, Yeoh Kok Ooi and Yeoh Seng Lye, who were also the chairman and managing director respectively of the company. Under art 86 it is provided that the number of directors shall not be less than two nor more than seven. It therefore follows that these two directors could exercise the powers of the company pursuant to art 102 and 103. Likewise the resolution of the company proposed and adopted by these two directors were validly made pursuant to arts 119 and 124. Applying the principles laid down in *Freeman*'s case,[7] it cannot be disputed that the two directors had 'actual' authority to execute the two charges with the bank. Even assuming the 'actual' authority is found wanting (to which I cannot accede) it surely cannot be said that they did not have at the material time, an 'apparent' or 'ostensible' authority to exercise the charges. But then it is said that the two directors could not borrow money if the borrowed money was not used for the purpose or benefit of the company. On the principle laid down in *Brougham*'s case[1] and *Re Introductions Ltd*'s case[4] cited earlier, I do not think such a contention can be sustained for that principle certifies that 'where a company has a general power to borrow money for the purposes of its business, a lender is not bound to enquire into the purpose for which the money is intended to be applied.' This principle is reiterated by Browne-Wilkinson LJ in *Rolled Steel Products (Holdings) Ltd* v *British Steel Corporation & Ors*[8] at pp 305-306:

> In my judgment, the propositions in the last two paragraphs accord with the decisions in *In re David Payne & Co Ltd* [1904] 2 Ch 608 and *Charterbridge Corporation Ltd* v *Lloyds Bank Ltd* [1970] Ch 62. As Slade LJ has pointed out, in the *David Payne* case the objects clause of the company stated expressly that the power to borrow was 'for the purposes of the company's business,' yet the borrowing (which was not in fact for the purpose of the company's business) was held not to be ultra vires. Buckley J at p 612, plainly treated the provision as a power, not an object. Vaughan Williams LJ held, at p 615, that the fact that the validity of the debenture depended on whether or not the lender had knowledge of the impropriety showed that the transaction was not ultra vires. Moreover, it was held that, knowledge being a necessary requirement to render the loan unenforceable, the lender was not put on inquiry whether the money was being borrowed for the purposes of the company's business, notwithstanding that the power to borrow was expressly limited to borrowing for those purposes. That case, therefore, is clear authority for two propositions: (1) that where there is a power to borrow for the purposes of the company's business (even if contained in the objects clause) and the borrowing is made otherwise than for those purposes the borrowing is not void as being ultra vires: and (2) a third party is not put on notice by an express requirement that the power is only exercisable for the purposes of the company's business.

Quite apart from what have been discussed above, even assuming that the third party charges were ultra vires the company's memorandum and articles of association, they could be saved by s 20(1) of the Companies Act 1965 which reads:

> No act or purported act of a company (including the entering into of an agreement by the company and including any act done on behalf of a company by an officer or agent of the company under any purported authority, whether express or implied, of the company) and no conveyance or transfer of property, whether real or personal, to or by a company shall be invalid by reason only of the fact that the company was without capacity or power to do the act or to take the conveyance or transfer.

From the facts as adumbrated above, I fail to see how one can contend that the said s 20(1) has no application. I agree with counsel for the bank that the said section abolishes the otherwise rigorous effect of the ultra vires doctrine. The following passage from the *Sourcebook of Singapore and Malaysian Company Law* (1975 Ed) by Philip N Pillai at p 121 cited by the learned counsel lends support to this proposition:

> Section 20(1) is in my view directly applicable to the plaintiff's contention that a joint borrowing was beyond the power of Landmark Finance. The plaintiff's allegation is that Landmark Finance lacked the power to give this joint debenture to secure joint borrowings. But even if it did, s 20(1) provides in terms that Landmark Finance's act in that connexion shall not be invalid by reason only of the fact that Landmark Finance was without such power. Generally speaking, sub-s (1) strikes down the absolute effect of the ultra vires doctrine. An ultra vires transaction is no longer a complete nullity, incapable of being recognized as a transaction at all. On the contrary, it is a transaction which, in general terms, is not invalid by reason only of the fact that the company was without the capacity or power to enter in the transaction. But whilst the general

nullifying effect of the ultra vires doctrine is abolished by s 20(1), the legislature has marked out certain fields within which significance will still attach to an excess by a company or its officers of the legitimate scope for its activities as enunciated and restricted by the terms of its objects clause.

For the above reasons, I will allow the application of the bank and revoke the order of the court dated 16 September 1988 granting the stay of the sale of the land by public auction. The plea for leave to set aside the order of the court directing the sale of the land by public auction made by Metro is also revoked.

Application allowed.

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Reported by *PS Ranjan*